SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

No. 77.

THE WISCONSIN AND MICHIGAN RAILWAY COMPANY, APPELLANT,

vs.

PERRY F. POWERS, AUDITOR GENERAL OF THE STATE OF MICHIGAN, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

Brief and Argument for Appellant.

JESSE R. BARTON,
Solicitor for Appellant.

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STATEMENT.

MAY IT PLEASE THE COURT:

This case comes to this Court by appeal from the decree of the Circuit Court of the Eastern District of Michigan, sustaining the demurrer of appellee to the bill of complaint of appellant and dismissing that bill for want of equity.

The bill sought to enjoin the Auditor General from enforcing the alleged lien for a specific tax levied against the Railroad Company under an Act of the Legislature of the State of Michigan, passed in 1897.

The Constitution of the State of Michigan is divided into a number of articles, which are again subdivided into sections. Article 14 is entitled "Finance and Taxation." Article 15 is entitled "Corporations." Section 1 of Article 15 of the Constitution provides that "Corporations may be formed under general

laws, but shall not be created by special act, except for municipal purposes. All laws passed pursuant to this section may be amended, altered or repealed," etc.

In 1873, the Legislature of the State of Michigan passed an act entitled "An Act to revise the laws providing for the incorporation of railroad companies and to regulate the running and management and to fix the duties and liabilities of all railroad and other corporations owning or operating any railroad in this State." This act was divided into five articles, entitled, respectively: "Organization," "Corporate Powers and Duties of Directors," "Taxation," "Police Regulations," "Miscellaneous Provisions." Section 11 of Article 5 of this act contained the following provision: "This act may at any time be altered, amended or repealed, but such alteration, amendment or repeal shall not affect the rights of property of companies organized under it." Section 3 of Article 3 of the Act of 1873 provided for an annual tax upon the gross receipts of railroad corporations without any exemptions. The Act of 1873 has never been revised as an entire act since its passage, but numerous sections have been amended in the manner prescribed by the Constitution of the State, and in 1893, Section 3 of Article 3 was amended and there was added thereto the following: "PROVIDED, FURTHER, That the rate of taxation fixed by this act or any other law of this State shall not apply to any railway or railroad company hereafter building and operating a line of railroad within this State north of parallel 44 of latitude, until the same has been operated for the full period of ten years, unless the gross earnings shall equal $4,000 per mile, except in so far as said line so built shall extend south of said parallel, but no such company shall be entitled to the immunity from taxation herein provided, when the same is owned or operated by existing companies, until the report of earnings to the Commissioner of Railroads, required by the laws of this State, containing the earnings of such line hereafter built, separate and distinct from the earnings of existing lines, shall be made and filed."

All of the Northern Peninsula of Michigan lies north of the forty-fourth parallel, and that part of the main Peninsula of Michigan which lies north of the forty-fourth parallel in 1893 contained no towns of any considerable size, excepting the City of Manistee, which is but a short distance north of that parallel.

Subsequent to the date when the above mentioned Act of 1893 became a law, the Menominee & Northern Railroad Company was organized under the laws of the State of Michigan; and immediately upon its organization, and before any part of its line was constructed, and before the above mentioned law of 1897 went into effect, it sold all of its franchises and rights to the Wisconsin & Michigan Railway Company, a corporation of the

State of Wisconsin, incorporated after said act of 1893 went into effect, appellant in this case, under authority of the laws of the State of Michigan. (Rec., p. 2.) All of the line of railroad under consideration lies north of the forty-fourth parallel, and in the upper peninsula of Michigan. The gross earnings of appellant have never in any year subsequent to May 27th, 1893, when the first above mentioned act went into effect, been equal to $4,000 per mile. Before construction of the railroad, the country adjacent to the same was undeveloped and covered with large areas of timber, with little or no agriculture. Since the construction, towns and villages have been built up, timber has been cut off and marketed, and considerable areas of land put under cultivation. The railroad upon which the specific tax is sought to be enforced was completed and put in operation about November 1st, 1894.

By act approved July 4th, 1897, the Legislature of the State of Michigan amended Section 3 of Article 3 of the Act of 1873, as theretofore mentioned, so as to read as follows:

"Every railroad company and union railroad station and depot company owning or operating any railroad situated in whole or in part in this State, shall, on or before the first day of July, in each year, pay to the State treasurer, on the statement of the auditor general, a specific tax upon the property and business of such railroad corporation operated within the State, which tax shall be computed in the following manner, viz., namely: Upon all such gross income not exceeding two thousand dollars per mile of road actually operated within the State, two and one-half per cent. of such gross income; upon such gross income in excess of two thousand dollars and not exceeding four thousand dollars per mile, three and one-half per cent. thereof; upon all such gross income in excess of four thousand dollars and not exceeding six thousand dollars per mile, four per cent. thereof; and upon all such gross income in excess of six thousand dollars per mile, and not exceeding eight thousand dollars per mile, four and one-half per cent. thereof; and upon all such gross income in excess of eight thousand dollars per mile of the road so operated, five per cent. thereof; that all gross income of union railroad station and depot companies whose earnings are in excess of twenty thousand dollars per mile shall pay on all such gross incomes in excess of twenty thousand dollars per mile of road so operated, ten per cent. thereof. And when the railroad lies partly within and partly without this State, *prima facie*, the gross income of said company from such road for the purposes of taxation shall be on the actual earnings of the road in Michigan, computed by adding to the income derived from the business transacted by said company entirely within this State, such proportion of the income of said Company arising from the

interstate business as the length of the road over which said interstate business is carried in this State bears to the entire length of the road over which said interstate business is carried. The taxes so paid shall be in lieu of all other taxes upon the properties of such companies, except such real estate as is owned and can be conveyed by such corporations under the laws of this State, and not actually occupied in the exercise of its franchises, and not necessary or in use in the proper operation of its road, but such real estate so excepted shall be liable to taxation in the same manner, and for the same purposes, and to the same extent, and subject to the same conditions and limitations as to the collection and return of taxes thereon, as is other real estate in the several townships or municipalities within which the same may be situated.

"All acts or parts of acts contravening the provisions of this section of this act are hereby repealed."

Section 11 of Article 5 of the Act of 1873 has remained unchanged since the original passage of the act.

It is claimed by appellant, that: First, the Act of 1897 is a violation of the Constitution of the United States and the Acts of Congress in relation to commerce—it providing for the levy of a tax upon interstate commerce. Second, the act of 1897 is in violation of the Constitutions of the United States and of the State of Michigan prohibiting the passage of any law impairing the obligation of a contract. Third, the law of 1897 did not repeal the law of 1893 so as to take away from railroad corporations which had constructed their lines north of the forty-fourth parallel subsequent to the passage of the Act of 1893 the right of exemption from taxation on the same for the period of ten years after construction, where the gross earnings did not exceed $4,000 per mile.

BRIEF.

I.

IN GENERAL.

Board of Supervisors of Chippewa v. *Auditor General*, 65 Mich., 408.

Manistee & N. E. R. R. Co. v. *Com'rs of R. R.*, 118 Mich., 349.

II.

SECTION THREE OF ARTICLE THREE OF AN ACT TO REVISE "AN ACT TO REVISE THE LAWS PROVIDING FOR THE INCORPORATIONS OF RAILROAD COMPANIES AND TO REGULATE THE RUNNING AND MANAGEMENT AND TO FIX THE DUTIES AND LIABILITIES OF ALL RAILROAD AND OTHER CORPORATIONS OWNING OR OPERATING ANY RAILROAD IN THIS STATE," AS AMENDED BY THE ACT OF 1897, IS IN VIOLATION OF THE CONSTITUTION AND LAWS OF THE UNITED STATES RELATING TO COMMERCE.

III.

THE ACT OF 1897, IF IT REPEALS THE ACT OF 1893 SO AS TO TAKE AWAY THE RIGHT OF EXEMPTION PROVIDED IN THE ACT OF 1893, IS IN VIOLATION OF THE FEDERAL AND STATE CONSTITUTIONS PROHIBITING THE IMPAIRMENT OF THE OBLIGATION OF CONTRACTS.

Binghamton Bridge case, 3 Wall., 51, 74, 75.
Salt Co. v. *East Saginaw*, 13 Wallace, 377.
Grand Lodge case, 166 U. S., 143.
Morawetz on Private Corporations, 2nd Ed., Sec. 318.
Humphrey v. *Pegues*, 16 Wall., 249.
E. T. V. G. R. Co. v. *Pickerd*, 24 Fed., 614.
Bergman v. *Building Association*, 29 Minn., 275.
Piqua v. *Knoop*, 16 How., 376.
Corvin v. *Board of Commissioners*, 1 McCrary, 521.
City Ry. Co. v. *Citizen's R. R. Co.*, 166 U. S., 557.
Wellman v. *C. & G. T. Ry. Co.*, 83 Mich., 600.
Travers v. *St. P. M. & N. Ry. Co.*, 76 N. W. Rep., 217.

IV.

THE LAW OF 1897 DID NOT REPEAL THE LAW OF 1893 SO AS TO TAKE AWAY FROM RAILROAD CORPORATIONS WHICH HAD CONSTRUCTED THEIR LINES NORTH OF THE FORTY-FOURTH PARALLEL SUBSEQUENT TO THE PASSAGE OF THE ACT OF 1893 THE RIGHT OF EXEMPTION FROM TAXATION OF THE SAME FOR THE PERIOD OF TEN YEARS AFTER CONSTRUCTION WHEN THE GROSS EARNINGS DID NOT EXCEED $4,000 PER MILE.

Com. v. *P. & E. R. R.*, 164 Pa. St., 252-261.
Detroit Street Ry. Co. v. *Guthard*, 16 N. W., 328.
C. & O. R. R. Co. v. *Miller*, 114 U. S., 176.
Travers County v. *St. P. M. & N. Ry. Co.*, 76 N. W., 217.
Colton v. *Montpelier*, 71 Vt., 413.
Binghamton Bridge case, 3 Wall., 51, 74, 75.
Sutherland on Statutory Construction, Sec. 481.
Endlich on Interpretation of Statutes, Sections 271 *et seq.*

ARGUMENT.

I.

IN GENERAL.

Under the Constitution of the State of Michigan the Legislature has at all times had the power to exempt from taxation. This was expressly held by the Supreme Court of the State of Michigan in *Board of Supervisors of Chippewa* v. *Auditor General*, 65 Mich., 408. The law which is attacked in this case was before the Supreme Court of the State of Michigan in the case of *Manistee & N. E. R. R. Co.* v. *Com'rs of R. R.*, 118 Mich., 349, in which it was attacked solely on the ground that it was a violation of the Constitutions of the United States and of the State of Michigan, prohibiting the passage of laws impairing the obligations of the contracts; and while that court in that case held that the exemption was only a bounty and that it was, therefore, subject to repeal, it held that the exemption was good and that the right to it was vested until repealed and that the company was exempted from taxation until the act went into effect.

II.

SECTION THREE OF ARTICLE THREE OF AN ACT TO REVISE "AN ACT TO REVISE THE LAWS PROVIDING FOR THE INCORPORATION OF RAILROAD COMPANIES AND TO REGULATE THE RUNNING AND MANAGEMENT AND TO FIX THE DUTIES AND LIABILITIES OF ALL RAILROAD AND OTHER CORPORATIONS OWNING OR OPERATING ANY RAILROAD IN THIS STATE," AS AMENDED BY THE ACT OF 1897, IS IN VIOLATION OF THE CONSTITUTION AND LAWS OF THE UNITED STATES RELATING TO COMMERCE.

It is respectfully submitted that if this tax be upon the property and business of the corporation it comes within all of the rulings of this court which hold that it is not a tax upon interstate commerce. The act itself imposes a tax upon the property and business of the railroad corporation, and computes it upon the gross income; and where, as in this case, the railroad is partly in the State of Michigan and partly in another state, it provides that the gross income, for the purposes of taxation, shall be on the actual earnings in Michigan, computed by adding to the income derived from the business transacted entirely in the State such proportion of the income arising from *interstate business* as the length of the road over which interstate business is carried in that state bears to the entire length of the road over which said interstate business is carried. It is submitted that if this tax be

treated as a license fee solely imposed upon the corporation for conducting interstate commerce business as well as local business it would be in violation of the Federal Constitution.

III.

THE ACT OF 1897, IF IT REPEALS THE ACT OF 1893 SO AS TO TAKE AWAY THE RIGHT OF EXEMPTION PROVIDED IN THE ACT OF 1893, IS IN VIOLATION OF THE FEDERAL AND STATE CONSTITUTIONS PROHIBITING THE IMPAIRMENT OF THE OBLIGATION OF CONTRACTS.

As above shown, the Supreme Court of the State of Michigan has so construed the Constitution of that State that the Legislature has the power to grant exemption from taxation. The Legislature having the power to exempt from taxation, it might, unless prevented by a constitutional limitation, bind itself to such exemption, so that a contract would exist and would be irrepealable unless the right to repeal had been reserved. The power of the Legislature is plenary, and unless restricted by the Constitution it may exempt from taxation and may enter into a contract exempting from taxation; and, it appearing that there is no such constitutional limitation, the power to exempt extends to the power to contract for exemption.

It is conceded that in construing a grant, if there be doubt or ambiguity, everything is resolved in favor of the State and against the grantee. But that rule applies only in construing the language of the grant; for when the grant is in clear and unambiguous terms no rule of construction can be invoked, and the contract is to be dealt with the same as contracts between individuals are treated.

In the *Binghampton Bridge case*, 3 Wall., 51, 74, 75, the court lays down the rule in the following language: "The principle is this: that all rights which are asserted against the State must be clearly defined and not raised on inference or presumption; and if the charter is silent about a power, it does not exist. If on a fair reading of the instrument, reasonable doubts arise as to the interpretation to be given it, those doubts are to be solved in favor of the State; and when it is to be susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the State. But if there is no ambiguity in the charter and the powers conferred are plainly marked and their elements can be readily ascertained, then it is the duty of the court to sustain and uphold it and to carry out the true meaning and intention of the parties to it. Any other rule of construction would defeat all legislative grants and overthrow

all other contracts." Applying this doctrine, then, an examination of the exemption clause of the Act of 1893 will show it to be clear and unambiguous. There can be no question as to the meaning of the language or the intent of the Legislature. It is as plain as a rule in simple addition, and it must follow from the rules so laid down by this court that it is the duty of this court to sustain and uphold it and to carry out the true meaning and intention of the Legislature.

This, then, leaves this case with a clear and unambiguous grant of an exemption for a period of ten years, with all presumptions of law in favor of its continuance during that period, with the burden upon the appellee to show everything that he claims may be an avoidance of, or the right to avoid, or an annullment of, the grant so made.

It is difficult to draw the line between a mere bounty which may be withdrawn at any time and a grant of a privilege which is irrepealable by reason of its contract character. One element of a bounty is that it is left indefinite as to duration, and by the nature and character of the thing it may be withdrawn as soon as it ceases to yield a benefit to the granting power. It would seem that this court has taken a view that where a corporation is incorporated in view of the grant of a privilege to it by the Legislature, then that grant is not a bounty, but is a contract. In the case of *Salt Co.* v. *East Saginaw*, 13 Wallace, 377, as reviewed in the *Grand Lodge case*, 166 U. S., 143, this position was taken. What was said in the *Grand Lodge case* with reference to a special charter applies equally to a corporation acting under a general law. Morawetz (2nd Ed., Sec. 318) says: "The same rule of construction applies to articles of incorporation adopted pursuant to general laws as to the charters of incorporations granted by special acts of the Legislature. In construing the extent of the rights of franchises of a corporation and the powers of its agents, substantially the same implications must be made whether the company was incorporated under a general or by special act."

Humphrey v. *Pegues*, 16 Wall., 249.

E. T. V. G. R. Co. v. *Pickerd*, 24 Fed., 614.

Bergman v. *Building Association*, 29 Minn., 275.

Piqua v. *Knoop*, 16 How., 376.

Corbin v. *Board of Commissioners*, 1 McCrary, 521.

It is not conceded that Article 3 of the Act of 1873 was any part of the charter or articles of incorporation of either the Menominee & Northern or the Wisconsin & Michigan Railway Company, but the foregoing sustains this claim, that where there is a general act of the Legislature granting an exemption from taxation for a period of years to a public service corporation which is thereafter incorporated and performs all that can be required of it to earn the exemption, then, no matter whether

the laws under which exemptions are granted are general or special, the grant becomes a contract and irrepealable.

This court holds that the operation of a railroad is a sufficient consideration for a grant so as to constitute such grant a contract and irrevocable.

City Ry. Co. v. *Citizen's R. R. Co.*, 166 U. S., 557.

Cases cited in *Grand Lodge N. O.*, 166 U. S., 143.

Under the laws of Michigan a railroad corporation of the State of Wisconsin may acquire all of the charter rights, privileges, benefits and property of a corporation of Michigan for the purposes of extending the Wisconsin railroad into Michigan.

At the time of the incorporation of the Menominee & Northern and the incorporation of appellant and the purchase by the appellant of all the rights of the Menominee & Northern and the construction of the line of railroad in question, the grant from the State was the right to construct a railroad, which, being north of the forty-fourth parallel, should be exempt from taxation for a period of ten years, unless its gross receipts exceeded four thousand dollars per mile, and in pursuance of this grant the railroad in question was built and put in operation. It has developed the country and increased the taxable property of the State, as was undoubtedly contemplated by the Legislature in 1891 and 1893. It has given all the consideration required of it—a good, valuable consideration—and is now entitled to the benefits of the grant.

In construing this question of consideration the court will take judicial notice of all of the conditions which exist north of the forty-fourth parallel and especially in the upper peninsula of Michigan, in which this railroad is located. The Supreme Court of Michigan, in *Wellman* v. *C. & G. T. Ry. Co.*, 83 Mich., 600, says: "We are authorized to take judicial knowledge, for it is a matter of general knowledge, that the cost of building and running railroads in the upper peninsula is much greater than that in the lower, owing to marked difference between them in the character and face of the country. This distinction has been carried in the railroad law of the State for over seventeen years; and distinctions in the legislation upon many matters between the two peninsulas have been constant and frequent ever since the upper peninsula has been a part of Michigan."

The Supreme Court of Minnesota, in *Travers* v. *St. P. M. & M. Ry. Co.*, 76 N. W. Rep., 217, states, with reference to the State of Minnesota, what may as well be applied by this court with reference to the northern part of the State of Michigan, that: "It is a part of the legislative history of Minnesota both as a territory and a state, that its policy in regard to taxing land grant roads was adopted with reference alike to facilitating the early construction of these lines of road and to securing to the State what

was supposed an ultimate and adequate return for the value of the franchises conferred and which would, in the long run, be equivalent to the companies' fair share of taxation."

The court should also take into consideration the control which the State exercises over railroads in their operation, and the duties imposed by the State, the restrictions as to charges for carrying imposed by the State, and the general public character of a railroad company. A railroad company assumes to perform *a public function;* its road is a public highway and the assumption of the public duties are held to be a sufficient consideration for any special legislative grant to a railroad company.

It may be claimed that the reservation in the Constitution of the State of Michigan authorized the withdrawal by the Legislature of the right of exemption granted by the Act of 1893. It is respectfully submitted that this claim, if made, would be untenable. The reservation in the Constitution is in Article 15, which relates solely to corporations, and states that all laws passed pursuant to that section might be amended, altered or repealed. No such reservation is found in any other article or section of the Constitution, and, therefore, the reserved right must be applied only to legislation passed under that article. As has been shown, the Act of 1873 was subdivided into articles. Article 3 of that act was not passed in pursuance of any power given by Article 15 of the Constitution, but under the provisions of Article 14 of the Constitution, and, therefore, the reservation cannot affect Article 3 of the act. It certainly cannot be claimed that the reservation in the Act of 1873 to alter, amend or repeal can give to the Legislature the power to withdraw this exemption, because that reservation expressly states: "but such alteration, amendment or repeal shall not affect the rights of property of companies organized under it."

IV.

THE LAW OF 1897 DID NOT REPEAL THE LAW OF 1893 SO AS TO TAKE AWAY FROM RAILROAD CORPORATIONS WHICH HAD CONSTRUCTED THEIR LINES NORTH OF THE FORTY-FOURTH PARALLEL SUBSEQUENT TO THE PASSAGE OF THE ACT OF 1893 THE RIGHT OF EXEMPTION FROM TAXATION OF THE SAME FOR THE PERIOD OF TEN YEARS AFTER CONSTRUCTION, WHEN THE GROSS EARNINGS DID NOT EXCEED $4,000 PER MILE.

It is respectfully submitted to the court that a legislature will never be presumed to have withdrawn a grant accepted by a grantee in good faith and for which a valuable consideration has passed to the State.

The exemption clause of the Act of 1893 amending the sections of Article 3 of the Railroad Act of 1873 is, in a sense, a special act relating to a particular part of the State of Michigan, which, as has been seen, is sustained by the Supreme Court as to that territory. The only repeal of the Act of 1893, excepting the general repeal by implication which is assumed from a general revision of a law, is contained in the last paragraph of the Act of 1897, to-wit: "All acts or parts of acts contravening the provisions of this section of this act are hereby repealed." It has been frequently held by many courts that this language of repeal does not repeal a prior special act; but, for brevity, we call the attention of the court only to the case of *Com.* v. *P. & E. R. R.*, 164 Pa. St., 252-261, which was a case identical with the one at bar, excepting that the exemption was contained in a special charter act, or rather a special act amending the original charter. The language of the court on page 264 is here quoted not only to sustain the position that the Act of 1897 did not repeal the exemptions contained in the Act of 1893, but as well on the question of consideration: "The full benefit and advantage of this contract has accrued to the Commonwealth. Her territory has been vastly improved over the whole length of the road. More business interests have been established, towns and cities have been built, population has largely increased, and a region which was an almost unbroken wilderness in 1852 when the act in question was passed, is now a cultivated country, abounding with population in pursuing innumerable industries and contributing immensely to the wealth of the Commonwealth and to the increase of its revenues. Upon no principle of common justice, of sound morality or of special law can such be imputed to be the contract. In our judgment, the grant of exemption from taxation in the Act of 1852 was a term of the contract, and in no sense a mere condition that is held out as a bait to ensnare the public to part with their money and then deny them the terms of consideration upon which it was given. But the Commonwealth has not expressed any such purpose. The exempting Act of 1852 and the General Taxing Law of 1879 can easily stand together and be administered without conflict, and, therefore, there is no inconsistency on which to found a repeal by implication."

And it is respectfully submitted that the exemption clause of the Act of 1893 may as well stand now since the passage of the Act of 1897 as before the passage of the latter act.

The question of the reservation of the right to repeal is a peculiar one in this case. As above stated, the constitution of the State of Michigan gives to the Legislature certain powers of taxation, including the imposition of specific taxes, and no limitations or restrictions were placed on the Legislature as to

uniformity of specific taxes. Under Article 14 of the Constitution, the Legislature could impose specific taxes without any regard to uniformity, and could exempt therefrom. Under Article 15 of the Constitution the Legislature was limited in its powers. It cannot create a corporation, except for municipal purposes, except by a general law. All laws passed pursuant to the first section of that article might be amended, altered or repealed. Reading this *section of Article 15 of the Constitution* alone, it provides that no corporation, except for municipal purposes, may be formed, unless by a general law; and such general law, so far as it forms a corporation, may be amended, altered or repealed.

The Act of 1873, as above stated, is divided into a number of articles. Article 3 related, and, through all its subsequent amendments has related, solely to specific taxes imposed upon railroads, and was clearly passed under Article 14 of the Constitution; so that to Article 14 of the Constitution we must look for any restrictions or limitations on the Legislature as to Article 3 of the Act of 1873. There being no reserved power of amendment, alteration or repeal in Article 14 of the Constitution, the Legislature was empowered—so far as the Constitution went—to pass Article 3 of the Act of 1873, and covenant that it should be unalterable and irrevocable; and it is only so much of the Act of 1873 as was passed in pursuance of Article 15 of the Constitution and the restrictions upon the legislative powers therein contained, that is subject to that provision of Article 15 of the Constitution providing for amendment, alteration and repeal.

The Legislature having in view this construction of the Constitution, and knowing that Article 3 of the Act of 1873 was not subject to the right of amendment, alteration or repeal reserved in Article 15 of the Constitution interpolated in the Act of 1873 as Section 11 of Article 5 thereof, the following: "This act may at any time be altered, amended or repealed; but such alteration, amendment or repeal shall not affect the rights of property of companies organized under it." Any other view than that herein taken would render Section 11, Article 5, Act of 1873, meaningless: because, if the right to amend, alter or repeal the entire Act of 1873, or any part of it, had been reserved unqualifiedly in Article 15 of the Constitution, then it was useless to reserve that right at all, and worse than useless to attempt to reserve it with an exception, for no exception should be made.

It is clear, therefore, that the reservation in Article 15 of the Constitution has no application whatever to Article 3 of the Act of 1873.]

If, then, the reservation in Section 3, Article 3, of the Act of 1873, excepts the right claimed by the complainant herein, the exception is good and complainant is entitled to exemption contained in the Act of 1893. While we do not admit that the general Act of 1897 did repeal the exemption from taxation contained in the Act of 1893, yet, if it did, and such repeal affected the rights of property of this company, which was organized under it, then those rights exist and are protected by the very act itself; and the question is resolved into the simple one of whether or not this exemption is a right of property. It was held in the case of *Detroit Street Ry. Co.* v. *Guthard*, 16 N. W., 328, that exemption from taxation is not a "corporate right;" in *C. & O. R. R. Co.* v. *Miller*, 114 U. S., 176, it was held that such exemption was not a franchise; while in *Travers County* v. *St. P. M. & N. Ry. Co.*, 76 N. W., 217, and in *Colton* v. *Montpelier*, 71 Vt., 413, it was held that it was a property right. The Act of 1897, if it provides for the taxation of the complainant company, provides that such taxation shall be a lien on the railroad of the company which earns the moneys forming the basis for the computation of the tax. It is this lien which we ask the court to restrain the Auditor General from enforcing. The lien is a burden on the property; the right of exemption from that lien is necessarily a right of property.

It is doubtful if the language of either the Constitution or the Act of 1873, reserving powers, was intended to affect a corporation which should be organized under the Act of 1873, in any other respect than in the exercise of the ordinary police powers over them; that is to say, if a corporation be created under the law of 1873 with certain general powers to exist for a certain period, would a repeal—an absolute repeal—of the law of 1873 affect the existence, or the right of exercise of general powers, of that corporation? It is true that with the act repealed no new corporation could be formed, but it is submitted that it would not have the effect of destroying the corporate existence of those organized before the repeal. There are but two agencies capable of conducting the business of operating a railroad, namely: the State and a private corporation. It surely was not contemplated by the people in the adoption of the Constitution that the Legislature might pass a general law for the incorporation of railroads, and, as soon as a sufficient number were incorporated and the roads constructed, repeal that act and thereby put out of existence the corporations which constructed the roads. Surely upon incorporation and construction a railroad company has acquired some vested rights that cannot be taken from it; and it was the intention of the people that they should not be taken from it. The people undoubtedly intended that, as to things pertaining to public welfare, the general incorporation act might be amended

or altered so as to affect corporations created under it, but not to annul their charters or take from them vested property rights for which they had paid good and valuable considerations.

The language of this court in the *Binghampton Bridge case* is again called to your special attention, and it is submitted that as the Act of 1893 is not ambiguous, and as a good consideration passed from the railroad company for the grant therein contained, it is the duty of this court to sustain and uphold the contract and to carry out the true meaning and intention of the parties to it.

In Sutherland on Statutory Construction, Section 481, and Endlich on Interpretation of Statutes, Sections 271, *et seq.*, and in the numerous cases there cited, and still more cases reported since the publication of those works, the doctrine is announced that a statute affecting rights and liabilities should not be construed as to act upon those already existing, and it is a result of the decisions that, although the words of a statute are so general and broad in their literal extent as to comprehend existing cases, they must yet be so construed as to be applicable only to such as may thereafter arise, unless the intention to embrace all is clearly expressed. This is the doctrine of the courts as applied to repeals; and where rights have become vested, in many cases it has been held that the broadest and most clear and distinct general terms of repeal will be construed to mean the exception of those cases which arose under the repealed statute and where rights have been vested therein.

In this case, the Act of 1873 stood, before the passage of the amendment of 1897, with a proviso that any amendment or alteration of the same should not affect the rights of property of companies organized under it; and so it stood after the passage of the amendment of 1897. Clearly, then, it was the intention of the Legislature that the amendment of 1897 should not affect property rights already vested; therefore, with much more force than could have been claimed in the cases cited by Sutherland and Endlich, can it be claimed in this case that the amendment of 1897, with its statement that all acts or parts of acts contravening the provisions of that section and that act were thereby repealed, did not and was not intended to withdraw the property right of exemption from taxation for a period of ten years that had been granted to appellant by the Act of 1893.

Respectfully submitted.

JESSE B. BARTON,
Solicitor for Appellant.